

82 - 1767

Office - Supreme Court, U.S.
FILED

APR 29 1983

ALEXANDER STEVAD

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NO. _____

HATTERAS, INC.,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

ROBERT EIKEL
1442 Esperson Building
Houston, Texas 77002
(713) 228-0906
Attorney for Petitioner
Hatteras, Inc.

QUESTIONS PRESENTED

1.

Is the ancient maritime law of abandonment applicable to an United States naval vessel sunk in an engagement by an enemy vessel and abandoned by her crew and the United States? (The USS HATTERAS, sunk by the Confederate States raider ALABAMA.)

2.

Is the finder of the wreckage of a governmental vessel abandoned and lost for more than a century entitled to its possession (and title on salvage) under the maritime law of finds?

3.

Can the Secretary of the Interior lawfully designate as an historic site for inclusion in the National Register a site or place in international waters beyond the territorial limits of the United States?

II

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions	1
Jurisdiction	2
Constitutional Provisions, Treaty, Statutes, and Regulations Involved	2
Constitution	2
Treaty	2
Statutes	2
Regulations	2
Statement	3
Reasons for Granting the Writ	4
The HATTERAS was abandoned and became a derelict	4
1. The Sinking	4
2. The Lapse of Time	4
3. The Navy's Recognition of Abandonment	5
4. The ALABAMA Claims	5
A derelict can be appropriated by the finder	5
The Federal Property Act is not applicable	6
The National Register of Historic Places	6
The Constitutional Provision	7
Conclusion	8
APPENDIX:	
1. Decision of Court of Appeals, February 2, 1983	1a
2. Final Judgment of District Court, February 18, 1982	2a
3. Supplemental Memorandum and Order of District Court, February 18, 1982	3a
4. Memorandum and Opinion of District Court, February 25, 1981	7a
5. Constitutional Provisions	25a

III

	Page
6. Treaty	25a
7. Statutes	
16 U.S.C. § 470(a)(1)	26a
16 U.S.C. § 470(b)(1)(3)(4)	27a
40 U.S.C. § 471	27a
40 U.S.C. § 472(f)	28a
40 U.S.C. § 483(h)	28a
40 U.S.C. § 512(a)	29a
8. Regulations	
36 C.F.R. § 800.2(d)(e)(f)(g)	29a
9. Letters of recommendation for abandonment	
12 March, 1976	31a
8 March, 1976	33a
25 March, 1976	35a

TABLE OF AUTHORITIES

CASES	Page
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, at 338, 56 S.Ct. 466 (1936)	7
B. C. Terry, The, 9 Fed. 920, 922 (S.D. Ga. 1881)	4
Burlington, The, 73 Fed. 258 (D. Mich. 1896)	5
Hawkins v. Barney, 80 U.S. (5 Peters) 457, 8 L.Ed. 190 (1831)	5
Island City, The, 66 U.S. (1 Black) 121, 17 L.Ed. 70 (1862)	4
Laura, The, 81 U.S. (14 Wall.) 336, 20 L.Ed. 813 (1872)	4
Platoro Limited v. Unidentified Remains, 508 F.2d 1113 (5 Cir. 1975), and 614 F.2d 1051 (5 Cir. 1980)	6
Rickard v. Pringle, 293 F.Supp. 981 (S.D. N.Y. 1968) ..	5
Rowe v. The Brig, Fed. Cas. No. 12093, 20 Fed. Cas. 1281 (Cir. Ct. Mass. 1818)	4
State of Florida v. Massachusetts Co., 95 So.2d 902, 63 A.L.R.2d 1360 (Fla. S.Ct. En Banc 1956), rehearing 95 So.2d 908, cert. den. 355 U.S. 881, 78 S.Ct. 147 (1957) ..	8, 9
Treasure Salvors, Inc. v. Unidentified Wrecked, etc., Vessel, 569 F.2d 330 (5 Cir. 1978), 621 F.2d 1340 (5 Cir. 1980), 640 F.2d 560 (5 Cir. 1981)	5, 6, 7
United States v. Pennsylvania & Lake Erie Dock Co., 272 Fed. 839 (6 Cir. 1921)	7
United States v. Williams, 617 F.2d 1063, at 1073 (5 Cir. 1980)	7

IV

CONSTITUTIONAL PROVISIONS, TREATY, STATUTES, AND REGULATIONS

	Page
Section 3, Clause 2, Article IV of Constitution of the United States	2
Geneva Award Under Articles I to XI of the Convention of 1871	2, 5
16 U.S.C. §§ 431, et seq.	2, 5
16 U.S.C. § 470(a)(1)	2
16 U.S.C. § 470(b)(1)(3)(4)	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1333, et seq.	4
40 U.S.C. § 471	2, 6
40 U.S.C. § 472(f)	2
40 U.S.C. § 483(h)	2
40 U.S.C. § 512(a)	2, 5
46 U.S.C. §§ 741, et seq.	8
46 U.S.C. §§ 781, et seq.	4, 8
36 C.F.R. § 800.2(d)(e)(f)(g)	2

OTHER

Memoirs (Captain Semmes of ALABAMA), pp. 542-544 ..	4
---	---

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NO. _____

HATTERAS, INC.,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

OPINIONS

In its Memorandum and Opinion of February 25, 1981, the District Court denied petitioner's claims of possession and title but reserved decision with respect to salvage. App. 7a. On February 18, 1982, the District Court filed its Supplemental Memorandum and Order denying salvage, App. 3a, and entered its Final Judgment decreeing plaintiff take nothing and dismissing the action. App. 2a.

The Court of Appeals affirmed the judgment without opinion under Local Rule 21, on February 2, 1983. App. 1a.

To petitioner's knowledge none of these have been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 2, 1983. No opinion was written.

Jurisdiction of this Court is invoked under 28 U. S. Code § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATY, STATUTES, AND REGULATIONS INVOLVED

Constitution

Section 3, Clause 2, Article IV. (App. 25a).

Treaty

The Geneva Award Under Articles I to XI of the Convention of 1871 made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the 8th of May, 1871, between the United States and Great Britain. (App. 25a).

Statutes

16 U.S.C. § 470(a)(1)	(App. 26a)
16 U.S.C. § 470(b)(1)(3)(4)	(App. 27a)
40 U.S.C. § 471	(App. 27a)
40 U.S.C. § 472(f)	(App. 28a)
40 U.S.C. § 483(h)	(App. 28a)
40 U.S.C. § 512(a)	(App. 29a)

Regulations

36 C.F.R. § 800.2(d)(e)(f)(g) (App. 29a)

STATEMENT

The USS HATTERAS, a river vessel converted into a naval vessel, was employed on blockade duty off the Texas Gulf Coast when on January 11, 1863, it engaged in battle with the Confederate raider ALABAMA and was sunk. Its captain surrendered, and the crew abandoned the sinking vessel and were taken aboard the ALABAMA and later parolled in Jamaica. No governmental efforts were ever made to salve the wrecked vessel and in fact its exact location was unknown until discovery, and proof of its identity made, by petitioner's incorporators (hereafter referred to as petitioner).

The United States included a claim for the value of the HATTERAS in the claims made to the ALABAMA Claims' Commissioners, who made a lump sum award and declared barred all further claims relating to the subjects submitted.

When the wreckage was located after several years of arduous efforts periodically engaged in, to confirm their title petitioner applied to the Navy Department, and the Secretary of the Navy on March 25, 1976, made "a formal declaration of abandonment" "inasmuch as the Department of the Navy has in fact long since abandoned such vessel".

Learning of the find, the Secretary of the Interior nominated the site of the wreckage, in international waters of the Gulf of Mexico approximately 20 miles south of Galveston, Texas, for registration as a National Historic Place, and on January 28, 1977, it was so included in the National Register.

Petitioner brought this action to establish its ownership under the maritime law of finds of abandoned vessels,

under 28 U.S.C. § 1333, et seq., the Suits in Admiralty Act, and 46 U.S.C. § 781, et seq., the Public Vessels Act. The government affirmed it had title to the wreckage, while acknowledging it had no plans to salve it within the foreseeable future.

REASONS FOR GRANTING THE WRIT

The HATTERAS was abandoned and became a derelict.

1. The Sinking

When the vessel was sinking, the captain surrendered and with the crew left the vessel and they were taken aboard the ALABAMA (and taken to Jamaica and there parolled). So stated Captain Semmes of the ALABAMA in his *Memoirs*, pp. 542-544.

The ship was left "without hope of recovery, or intention to return", the test of abandonment as put by the Court in *The Island City*, 66 U.S. (1 Black) 121, 17 L.Ed. 70 (1862). Please see also *The Laura*, 81 U.S. (14 Wall.) 336, 20 L.Ed. 813 (1872), and *The B. C. Terry*, 9 Fed. 920, 922 (S.D. Ga. 1881), and also the opinion of Mr. Justice Story in *Rowe v. The Brig*, Fed. Cas. No. 12093, 20 Fed. Cas. 1281 (Cir. Ct. Mass. 1818).

2. The Lapse of Time

For more than a century (and even today after its exact location by petitioner) no effort has been made by the government to salve the vessel, and it has become a complete wreck, completely covered by silt except for a few machinery protrusions.

It is very strong evidence of abandonment when the former owners make no attempt to recover a vessel after a long lapse of time. *The Burlington*, 73 Fed. 258 (D. Mich. 1896); *Treasure Salvors, Inc. v. Unidentified Wrecked, etc., Vessel*, 569 F.2d 330 (5 Cir. 1978), and 680 F.2d 560 (1981); *Rickard v. Pringle*, 293 F.Supp. 981 (S.D. N.Y. 1968).

3. The Navy's Recognition of Abandonment

The Navy formally recognized the vessel's abandonment. Please see the communication of the Secretary of the Navy, on March 25, 1976, stating that the vessel had long since been abandoned and formally declaring abandonment. App. 35a. (The government argues that this abandonment was not made in accordance with the statute, 40 U.S.C. § 512, in that it was not stated the wreck had no commercial value, but irrespective of compliance with the statute to establish *abandonment at that time* it is submitted the action of the Secretary is additional, weighty evidence that the vessel *had already been* abandoned, as a recognition of a fact.)

4. The ALABAMA Claims

Furthermore, the government made claim for the value, presumably the full value, against Great Britain in the ALABAMA Claims, and received indemnification for that claim (along with the others) in the Commissioners' (arbitrators') award. The pertinent part of the award is set forth in the Appendix, App. 25a-26a.

A derelict can be appropriated by the finder.

This Court in *Hawkins v. Barney*, 80 U.S. (5 Peters) 457, 8 L.Ed. 190 (1831), put the rule of law thus:

"The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law; it existed in a state of nature, and is only modified by society, according to the discretion of the community."

The Court below has recognized the law of finds recently in a series of cases of derelicts. The *Treasure Salvors v. Unidentified Wrecked, etc., Vessel*, cases: 569 F.2d 330 (5 Cir. 1978), 621 F.2d 1340 (5 Cir. 1980), 640 F.2d 560 (5 Cir. 1981); and *Platoro Limited v. Unidentified Remains of a vessel* cases, 508 F.2d 1113 (5 Cir. 1975), and 614 F.2d 1051 (5 Cir. 1980).

The Federal Property Act is not applicable.

The Federal Property and Administrative Act, 40 U.S.C. §§ 471, et seq., was enacted in its first form in 1949, long after the actual abandonment of the HATTERAS. On examination this statute obviously was enacted to deal with property title to which was still in the government. Its language does not show the intention of Congress to *revive* title by the statute in properties once held by the government and title to which was extinguished by abandonment.

It is respectfully submitted that under the settled law of abandonment the title to the property involved *when abandoned* is extinguished, and cannot be revived.

The National Register of Historic Places.

After petitioner had located exactly the wreckage, the Secretary of the Interior proposed its site be registered under the statute, the Antiquities Act, 16 U.S.C. §§ 431, et seq., as an Historic Place. Such action is plainly in-

effective, either to revive title to the wreckage or to effect such registration.

Plainly, this wreckage is located outside of the territorial limits of the United States, being in international waters outside of even the contiguous zone, some 20 miles from the Texas coast. The territorial limits of the United States over ocean waters are referred to in *Treasure Salvors, Inc. v. Unidentified Wrecked, etc., Vessel*, 569 F.2d 330 at 338 (5 Cir. 1978), where the Court of Appeals expressly held that the Antiquities Act applies only to lands owned or controlled by the Government of the United States, plainly a direct holding that the Secretary of the Interior's designation was of no effect. Please see also the decision of the Court of Appeals in *United States v. Williams*, 617 F.2d 1063, at 1073 (5 Cir. 1980).

The Constitutional Provision.

In answer to the government's apparent contention that properties of the United States cannot be abandoned, but instead can only lawfully be disposed of in accordance with a Congressionally-enacted statute, it is respectfully submitted the law is to the contrary.

In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, at 338, 56 S.Ct. 466 (1936), this Court held:

" . . . The constitutional provision [the Property Clause] is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends . . ."

That property of the United States may be abandoned has been held in a case with a maritime connotation, in *United States v. Pennsylvania & Lake Erie Dock Co.*, 272 Fed. 839 (6 Cir. 1921), abandonment of an inland waters pier.

And this Court has itself, albeit of course not in a binding fashion, recognized that a derelict vessel can be abandoned. In *State of Florida v. Massachusetts Co.*, 95 So.2d 902, 63 A.L.R.2d 1360 (Fla. S.Ct. En Banc 1956), rehearing 95 So.2d 908, cert. den. 355 U.S. 881, 78 S.Ct. 147 (1957), the former battleship MASSACHUSETTS was described in a telegram from the Secretary of the Navy as having been abandoned, and this Court denied certiorari to the Florida court's determination that abandonment had occurred and therefore that the State could lawfully gain title by appropriation.

Finally, the enactment of the Merchant Vessels Act (46 U.S.C. §§ 741, et seq.) and the Public Vessels Act (46 U.S.C. §§ 781, et seq.) would seem to settle the question that the law of admiralty, of which abandonment and derelict and finder's rights are certainly parts, is lawfully applicable to vessels of the United States.

CONCLUSION

It is respectfully submitted that the HATTERAS was abandoned by the government, that abandonment extinguished the title and the vessel became a derelict, a *res nullius*, and that petitioner is entitled to a decree that it became the owner under the law of finds. The decisions below decide a federal question in conflict with applicable decisions of this Court, and are in conflict with the de-

cision of the Florida Supreme Court en banc in the *Battleship MASSACHUSETTS* case. It is submitted with respect that the writ sought should therefore be granted.

Respectfully submitted,

ROBERT EIKEL
1442 Esperson Building
Houston, Texas 77002
(713) 228-0906

*Attorney for Petitioner
Hatteras, Inc.*

1a

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 82-2099

HATTERAS, INC.,
Plaintiff-Appellant,

versus

**THE U.S.S. HATTERAS, ETC. and THE UNITED
STATES OF AMERICA, *IN PERSONAM*,**
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(FEBRUARY 2, 1983)

Before WISDOM, RUBIN and TATE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-78-77

(Filed February 18, 1982)

HATTERAS, INC.,
Plaintiff

v.

THE U.S.S. HATTERAS, her engines, tackle, armament,
apparel, cargo, appurtenances, etc., *in rem*, and UNITED
STATES OF AMERICA, *in personam*,
Defendants

FINAL JUDGMENT

In accordance with the Court's Supplemental Memorandum and Order of even date herewith, it is

ORDERED, ADJUDGED and DECREED that the plaintiff, HATTERAS, INC., take nothing, that this action be, and the same is hereby DISMISSED on the merits, and that defendant, UNITED STATES OF AMERICA, recover its taxable costs of action, if any.

This is a final judgment.

DONE at Galveston, Texas, this the 18th day of February, 1982.

/s/ HUGH GIBSON
United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

CIVIL ACTION No. G-78-77

(Filed February 18, 1982)

HATTERAS, INC.,
Plaintiff

v.

THE U.S.S. HATTERAS, her engines, tackle, armaments,
apparel, cargo, appurtenances, etc., *in rem*, and **UNITED
STATES OF AMERICA**, *in personam*,
Defendants

SUPPLEMENTAL MEMORANDUM AND ORDER

This action arose out of a dispute between the plaintiff, Hatteras, Inc., and the United States concerning the wreck of the United States Civil War vessel, the U.S.S. HATTERAS, and several artifacts which the plaintiff recovered therefrom. Plaintiff, claiming that the vessel had been abandoned by the government, sought to establish its ownership of the vessel under the maritime law of salvage and the adjunct law of finds. In the alternative, the plaintiff sought a salvage award from the government pursuant to the Public Vessels Act, 46 U.S.C. §§ 781 et seq.

The case was tried before the Court on August 13, 1980. In its memorandum and order of February 25, 1981, the Court held that the vessel was the property of the United States, and that plaintiff had failed to estab-

lish its claim of ownership. The Court further held, however, that the plaintiff was entitled to a salvage award commensurate with the value of the salvaged property, *i.e.*, several artifacts recovered from the vessel by the plaintiff, and the merit of the plaintiff's services. Because of a lack of evidence in the record as to the value of these artifacts, the Court ordered further proceedings to determine the amount of the salvage award.

An evidentiary hearing was held on December 3, 1981, and testimony was heard from various witnesses regarding the value of the artifacts. During concluding arguments, the government for the first time asserted the Suits in Admiralty Act statute of limitations, 46 U.S.C. § 745, applicable to salvage claims brought under the Public Vessels Act, see 46 U.S.C. § 782, as a bar to the plaintiff's action.

The statute of limitations is an affirmative defense, which if not plead as required by Fed. R. Civ. P. 12, ordinarily is waived. The time limitation in the Suits in Admiralty Act, however, unlike an ordinary statute of limitations, is not a procedural device precluding the existence of a remedy. It renders a claim against the United States not only unenforceable, but extinguishes the claim itself. *Marine Corp. of Delaware v. United States*, 283 F.2d 776, 778 (2d Cir. 1960). The limitation is thus a restriction upon the subject matter jurisdiction of this Court. See, *e.g.*, *Southern Pacific Co. v. United States*, 296 F.Supp. 552, 553 (S.D. Tex. 1968). Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction over the subject matter of a lawsuit, the Court must dismiss the action. Fed. R. Civ. P. 12(h)(3). See *Szyka v. United States Secretary of Defense*, 525 F.2d 62, 65 (2d Cir. 1975).

The statute of limitations applicable to suits under the Public Vessel Act and the Suits in Admiralty Act provides that an action must be brought within two years after it arises. 46 U.S.C. § 745. The jurisdictional limitation is not subject to waiver or tolling. *E.g.*, *Szyka v. United States Secretary of Defense*, *supra*, at 65; *Roberts v. United States*, 498 F.2d 520, 526 (9th Cir. 1975), *cert. denied*, 419 U.S. 1070 (1974); *Williams v. United States*, 228 F.2d 129, 132 (4th Cir. 1955), *cert. denied*, 351 U.S. 986 (1955); *Mejia v. United States*, 152 F.2d 686, 688 (5th Cir. 1945).

The sole issue before the Court, then, is whether plaintiff's salvage claim arose within two years of the bringing of this action. The artifacts involved in this case were recovered in two separate expeditions in January and February of 1976. Plaintiff's original complaint was filed on April 28, 1978. This suit, then, was not commenced within the two-year limitation period, and the Court lacks jurisdiction over its subject matter.¹ Accordingly, it is

1. The government argues that plaintiff's action for possession of and confirmation of title to the vessel is also barred by the Suits in Admiralty Act statute of limitations. The Court does not agree. Plaintiff alleged entitlement to possession of ownership of the vessel under the law of finds and the doctrine of *animus revertendi*. In other words, plaintiff alleged that at the time it discovered the remains of the HATTERAS, the vessel was no longer the property of the United States. To that extent, the plaintiff's suit for possession of and confirmation of title to the vessel was a libel *in rem*, and not a libel *in personam* against the United States pursuant to the Suits in Admiralty Act or the Public Vessels Act.

The government also points out a serious oversight in Sections IV and V of the Court's opinion of February 25, 1981. While the plaintiff's claim for salvage services under the Public Vessels Act is clearly based on *in rem* principles, its only remedy against the United States is a libel *in personam*. Hence, any discussion by the Court of an *in rem* remedy available to plaintiff in connection with a salvage award against the government, and the indication that such award could be enforced by lien upon the several artifacts salvaged from the HATTERAS is erroneous.

ORDERED, ADJUDGED and DECREED that Sections IV and V of the Court's memorandum opinion of February 25, 1981, is hereby WITHDRAWN; and that the Court's Order of February 25, 1981, is hereby VACATED; that plaintiff's claim of entitlement to salvage award is hereby DISMISSED for want of subject matter jurisdiction.

DONE at Galveston, Texas, this the 18th day of February, 1982.

/s/ HUGH GIBSON
United States District Judge

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

CIVIL ACTION No. G-78-77

(Filed February 25, 1981)

HATTERAS, INC.,
Plaintiff

v.

**THE U.S.S. HATTERAS, her engines, tackle, armament,
apparel, cargo, appurtenances, etc. *in rem*, and UNITED
STATES OF AMERICA, *in personam*,**
Defendants

MEMORANDUM AND ORDER

I. INTRODUCTION

This action arises out of a dispute between the plaintiff, Hatteras, Inc., and the United States concerning the wreck of the United States Civil War vessel, the U.S.S. HATTERAS, and several artifacts which the plaintiff has recovered from the vessel. The HATTERAS lies encased in mud some 60 feet below the surface of the Gulf of Mexico some 20 miles south of Galveston, Texas, and is situated wholly on the continental shelf, outside the territory of the United States. The artifacts which the plaintiff removed from the vessel are in the custody of the United States Marshal pending the disposition of this

controversy.¹ The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1333, The Suits in Admiralty Act, 26 U.S.C. §§ 741 *et seq.*, and the Public Vessels Act, 46 U.S.C. §§ 781 *et seq.*

The plaintiff seeks possession of and confirmation of title to the vessel and its appurtenances, or, in the alternative, a liberal salvage award in recognition of services rendered for the benefit of the government. Plaintiff first contends that the U.S.S. HATTERAS is a derelict vessel abandoned by the government, and that under general principles of maritime and international law, such abandonment constitutes a repudiation of ownership. Thus, plaintiff alleges that under both the maritime law of salvage and the adjunct law of finds, it is entitled to possession and ownership of the vessel through the doctrine of *animus revertendi*. If not, the plaintiff seeks a liberal salvage award consisting of either the vessel itself or a recoupment of the plaintiff's expenses. The government responds that it has never abandoned the vessel and is still its rightful owner. Further, the government contends that the plaintiff has failed to establish its right to a salvage award.

The case was tried before the Court, sitting without a jury, on August 13, 1980. For the reasons assigned herein, the Court finds that the U.S.S. HATTERAS is

1. Artifacts in the custody of the United States Marshal are:

(a) Builders plate, with legend "Harlan and Hollingsworth and Co., Iron Ship and Steam Engine Builders, no. 327, Wilmington, Delaware 1861";

(b) Two small bronze oil cups with covers;

(c) One brass steam valve;

(d) Two large bronze priming cups, one with attached pipe stem;

(e) One oiling pipe stem; and

(f) One iron ball with eye, weighing approximately 45 pounds.

the property of the United States, and that the plaintiff has failed to establish any claim to ownership of the vessel. The Court further finds, however, that the plaintiff's services constitute salvage under controlling principles of maritime law, entitling the plaintiff to an award commensurate with the value of the salvaged property and the merit of plaintiff's services. In view of the relative paucity of evidence in the record with respect to these factors, however, further proceedings are required to determine the amount and extent of the salvage award.

II. STATEMENT OF THE FACTS

The U.S.S. HATTERAS was originally constructed for use as a river excursion vessel. The vessel was purchased by the United States Navy in 1861, converted for military operations, and assigned to blockade duty along the Gulf of Mexico. That assignment, as it turned out, was to be the vessel's only tour of duty as a naval warship.

On the 11th of January, 1863, the U.S.S. HATTERAS engaged the Confederate raider, C.S.S. ALABAMA, in a brief, but decisive, battle. The engagement lasted but thirteen minutes; the HATTERAS was heavily damaged and quickly sank. The vessel was reported to have sunk approximately 20 miles south of Galveston, but the United States Navy made no attempt to ascertain the precise location at which the HATTERAS sank, nor did the Navy attempt to raise or otherwise salvage the vessel. The Government does not express any interest in such an undertaking now or in the foreseeable future.²

2. The government contends that the HATTERAS is most valuable left in place until professional archeological and survey work can be done insuring the preservation of the best and the most data possible.

Since 1972 the plaintiff has engaged in efforts to locate, salvage, and, if possible, raise the remains of the HATTERAS. Plaintiff notified the Department of the Navy in February 1976 that it had located a sunken vessel believed to be the HATTERAS, and desired to salvage the vessel. In March the Naval Supplies System Command recommended to the Chief of Naval Operations that the vessel be abandoned, stating that it was of historical significance only. The Chief of Naval Operations then certified to the Secretary of the Navy that the U.S.S. HATTERAS was non-essential to the defense of the United States and also recommended that the vessel be abandoned. On March 25, 1976, the Secretary of the Navy, stating that "the Department of the Navy has in fact long since abandoned such vessel," made a formal declaration of abandonment.

The government contends, however, that the Secretary's attempted abandonment of the vessel was without authority of law. The government argues that the power of a subordinate officer of the United States to dispose of public property exists solely by virtue of a valid congressional delegation of authority pursuant to Article IV, Section 3, Clause 2 of the United States Constitution (the property clause). In this instance the government submits that the Secretary's authority to abandon the vessel was derived exclusively from § 202(h)³ of the Federal Property and Administrative Services Act of 1949 (Property Act), 40 U.S.C. §§ 471 *et seq.* That statute and its implementing regulations would require a written determination that the vessel had no commercial value or that the estimated cost of continued care and handling would exceed the estimated proceeds from the sale of

3. 40 U.S.C. § 483(h) (1976).

the vessel as a prerequisite to abandonment. There is no evidence in the record indicating that the Secretary made such a determination, in writing or otherwise. Thus, the government concludes that the attempted abandonment by the Secretary failed and that the HATTERAS remains the property of the United States.⁴

The plaintiff concedes that the Secretary of the Navy failed to comply with the provisions of the Property Act and its implementing regulations, but contends that the Act is inapplicable. Essentially, the plaintiff argues that the HATTERAS, admittedly the property of the United States at one time, ceased to be so when the Navy failed over an extended period of time to take action consistent with a claim of continued ownership by the government. Plaintiff relies upon the common law standard of abandonment,⁵ and submits that under this standard the gov-

4. The government also contends that the Secretary's act is void for failure to comply with Executive Order 11593, requiring a determination whether the HATTERAS was an historical site eligible for inclusion in the National Register of Historic Places. The vessel has since been entered on the Register.

5. At common law, "abandonment" is the intentional and absolute relinquishment of property without reference to any particular person or for any particular purpose. A formal declaration is not necessary; abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property. 1 Am. Jur. 2d, *Abandoned, Lost and Unclaimed Property* §§ 1-42 (1962). While mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon. See *Wiggins v. 1100 Tons, More or Less of Italian Marble*, 186 F.Supp. 452 (E.D. Va. 1960).

Since abandonment works a divestment of title and ownership, one who finds abandoned property and reduces it to possession becomes its lawful owners. *Id.* It is now settled that, under general maritime law, owners of sunken or derelict vessels may abandon them so as to divest title and ownership. *Treasure Salvors, Inc. v. Unidentified*

ernment relinquished all title and interest in the vessel long before congressional enactment of the statute. Implicit in this argument, however, is the assumption that the Property Act, rather than conferring upon executive agencies a power to dispose of public property otherwise reserved solely to Congress by the property clause of the Constitution, limits an extant power of executive agencies to dispose of property under their control. Unless this underlying assumption as to the power of executive agencies is correct, the plaintiff's argument that government abandonment of the HATTERAS may be inferred from the Navy's inaction is fatally flawed.

III. THE ABANDONMENT OF PUBLIC PROPERTY BY THE UNITED STATES

Article IV, Section 3, Clause 2 of the United States Constitution provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The term "Territory and other Property belonging to the United States" includes all personal and real property rightfully belonging to the United States. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The authority granted to Congress in the property clause is plenary, and subordinate officers of the United States have

Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978). A finder and salvor of such property may become its lawful owner under the "law of finds." *Id.*

no power to release or otherwise dispose of federal property, absent an express or implied delegation of Congress' power under the property clause. *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941). It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials. *United States v. California*, 332 U.S. 19 (1947); *Lee Wilson & Co. v. United States*, 245 U.S. 24 (1917); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). Thus, a subordinate officer of the government cannot abandon property under his control except as authorized by the Congress, and then only in the manner prescribed by Congress. *Kern Copters, Inc. v. Allied Helicopter Service, Inc.*, 277 F.2d 308, 313 (9th Cir. 1960). In view of this well settled authority, the Court is of the opinion that the maritime (or common law) doctrine of abandonment has no application to this case. While this judicially conceived doctrine might prove dispositive of the factual questions in this case if it concerned a dispute between private citizens,

[T]he Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 40 (1947).

With respect to the question of abandonment, then, the dispositive issues are (1) whether Congress delegated to

the Secretary of the Navy the authority to abandon the HATTERAS; and (2) whether the Secretary complied with the "needful Rules and Regulations" prescribed by Congress pursuant to any statutory delegation of its power derived from the property clause. The United States cites the Federal Property and Administrative Services Act of 1949 as the source of any delegated authority the Secretary might have had to abandon the HATTERAS in this case. Specifically, the government contends that § 483(h) of the Property Act and its implementing regulations govern the abandonment of the vessel. Section 483(h) provides:

(h) Abandonment, destruction or donation of property. The Administrator may authorize the abandonment, destruction, or donation to public bodies of property which has no commercial value or of which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale.

The Court agrees that the Property Act is the apparent source of the Secretary's authority in this instance, although such a finding is not essential to the Court's decision.⁶ The Court has determined, however, that the

6. Having determined that the HATTERAS could not be abandoned by the Navy except as authorized by Congress and then only in the manner prescribed by Congress, the Court would reach the same result even were it to hold the Property Act inapplicable. The plaintiff bears the burden in this action of establishing that the Secretary was authorized by the Congress to abandon the HATTERAS in the manner attempted. The plaintiff, however, has directed the Court's attention to no other Act of Congress which would have authorized the Secretary of the Navy to dispose of the U.S.S. HATTERAS in the manner attempted in this case. Nor is the Court, on the basis of its own research, aware of any Act of Congress expressly or impliedly conferring upon the Secretary such authority.

Of its own initiative, the Court draws attention to one aspect of the Federal Property and Administrative Services Act which might

applicable provisions of the Act are to be found at 40 U.S.C. § 512 rather than 40 U.S.C. § 483(h), as suggested by the government. Section 512 governs the disposal by executive agencies of "foreign excess property," as that term is defined in the Act, and by virtue of its location outside the territory of the United States, the HATTERAS must be considered foreign excess property.⁷

In any event, the arguments advanced by the government with respect to § 483(h) apply with equal force to § 512. The requirements set forth in the latter provision are identical to those contained in the former:

create some doubt whether the Act applies. Title 40 U.S.C. § 472(d) excludes from the "property" subject to the Act "naval vessels of the following categories: battleships, cruisers, aircraft carriers, destroyers, and submarines . . ." Congressional approval is apparently required for the disposition of these vessels. *See* 10 U.S.C. § 7307; 32 C.F.R. § 736 (1979). Because this exclusion seems clearly directed toward warships of more recent vintage than the HATTERAS, which was classified by the Navy as a "side-wheel steamer, iron, third rate, three-masted schooner," and in view of apparent congressional intent to bring under the direction of the Property Act all government property not expressly excluded, *see* 40 U.S.C. § 471, the Court concludes that the HATTERAS is property subject to the Act. Otherwise, direct congressional approval of the proposed abandonment might have been required.

7. The HATTERAS is clearly "foreign excess property" as that term is defined in the Property Act. "Excess property" is any property under the control of any federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head there. 40 U.S.C. § 472(e). Such a determination was clearly made by the Secretary in this instance. As defined in § 472(f), the term "foreign excess property" means any excess property located outside the several states, the District of Columbia, Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands. It is undisputed that the wreck of the HATTERAS lies totally on the continental shelf, beyond the territory of the United States or any of the several states. *See Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, supra*; *see also Kern Copters v. Allied Helicopter Service, supra*.

(a) Authority of executive agency. Foreign excess property not disposed of under subsections (b) and (c) of this section may be disposed of (1) by sale, exchange, lease or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the head of the executive agency concerned deems proper; . . . The head of each executive agency responsible for the disposal of foreign excess property may execute such documents for the transfer of title or other interest in property and take such other action as he deems necessary or proper to dispose of such property; and may authorize the abandonment, destruction, or donation of foreign excess property under his control which has no commercial value or the estimated cost of care and handling of which would exceed the estimated proceeds from its sale.

Implicit in the statutory scheme of 40 U.S.C. § 512 is the requirement that, prior to any agency action, a determination be made whether the property proposed to be abandoned has any commercial value and, if so, whether the estimated cost of care and handling would exceed the estimated proceeds from its sale. The regulations and rules promulgated pursuant to this section expressly require the head of each executive agency to make a written determination whether these two conditions exist as a prerequisite to the abandonment of foreign excess property under his control. 41 C.F.R. §§ 101-45.500 *et seq.* (1979). Here, the Secretary of the Navy failed to make a written determination as to the commercial value of the HATTERAS prior to declaring the vessel to be abandoned by the Navy; indeed, there is no evidence in the record that the Secretary made any determination whatsoever with respect to the commercial value of the vessel. Accordingly, the Secretary's formal declara-

tion did not constitute a lawful abandonment of the vessel by the United States.

If the Property Act applies in this instance, the plaintiff argues that the failure of the Secretary to comply with its statutory directives should not prove fatal to the efficacy of the Secretary's declaration of abandonment. While not presented as such, the plaintiff evidently relies upon the theories of apparent authority and equitable estoppel in support of its position, pointing out that it has expended in excess of \$60,000 in its efforts to locate the wreck of the HATTERAS. Thus, the plaintiff urges the Court to wield its inherent equitable powers to award it title to the HATTERAS, even though the Secretary did not lawfully abandon the vessel. In this instance, however, plaintiff's claim for relief draws no support from equitable principles.

Clearly, the plaintiff must rely upon some theory of apparent authority of equitable estoppel to reach the desired result. Equally clear, however, is the settled case law precluding the plaintiff from asserting these equitable doctrines to give effect to an act of the Secretary of the Navy, even if the Secretary failed to realize the limitations placed upon his authority:

[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, e.g., *Utah Power & Light Co. v.*

United States, 243 U.S. 389, 409; *United States v. Stewart*, 311 U.S. 60, 70, and see, generally, *The Floyd Acceptances*, 7 Wall. 666.

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947).

A more fundamental reason exists for denying the plaintiff the equitable relief it seeks in this case, however. Plaintiff contends that it has engaged in long, diligent and expensive research since 1972 and has engaged in expensive and dangerous search, exploration and salvage in order to locate the HATTERAS. Yet, the record is devoid of any evidence that the plaintiff did so in reliance upon any action of the Secretary of Navy. In fact, the record indicates that the plaintiff requested no action by the Navy relating to a determination of the plaintiff's rights in the vessel until 1976. Simply stated, there is no factual basis to the plaintiff's claim for equitable relief. Thus, the plaintiff has established no basis in law or equity to support its claim to title of the vessel.

IV. THE LAW OF SALVAGE

There remains for the Court's consideration plaintiff's contention that it is entitled to a salvage award in accordance with principles of general maritime law. The formal requisites of an act of salvage are (1) a marine peril, (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part or the provision of services which contribute to such success. *Legnos v. M/V OLGA JACOB*, 498 F.2d 666, 669 (5th Cir. 1974). See generally G. Gilmore & C. Black, *The Law of Admiralty*, §§ 8-1 to 8-15 (2d ed. 1975).

The government argues that one of the elements of a salvage action—the existence of a marine peril—is absent from this case, thus rendering the law of salvage inapplicable.⁸ The government's argument is undermined, however, by the decision of the Fifth Circuit Court of Appeals in *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, *supra*. In *Treasure Salvors*, the Court of Appeals indicated that marine peril includes more than the threat of storm, fire or piracy to a vessel in navigation, and that the action of the elements in dispersing or threatening to conceal the location of a wrecked vessel satisfies the "marine peril" requirement of the law of salvage. *Id.* at 337. The government has attempted to distinguish this case from *Treasure Salvors* on its facts; however, this Court is of the opinion that there are no significant factual dissimilarities between this case and *Treasure Salvors* that would preclude a finding of marine peril under the law of salvage as articulated in the latter opinion.⁹ The Court finds that the plaintiff has satisfied the formal requisites of salvage and is entitled to a salvage award.

The plaintiff, relying upon *Brady v. S.S. AFRICAN QUEEN*, 179 F.Supp. 321 (E.D. Va. 1960), and *Treas-*

8. The government does not dispute that the plaintiff's services were rendered voluntarily, and the plaintiff's efforts were clearly successful to the extent that several artifacts have been recovered from the wreck of the vessel.

9. In *Treasure Salvors* the Court of Appeals noted that the vessel in question, which for centuries lay buried beneath the sands prior to her discovery, was still in danger of being lost after her discovery through the actions of the elements. In the instant case, the HATTERAS, which lies totally encased in bottom mud, was equally in peril of being lost through the actions of the elements, if indeed she was not lost these many years. Nor is the continued dispersing actions of the elements upon the vessel not "reasonably to be apprehended." 569 F.2d at 337 n. 13.

ure Salvors, supra, contends that it is entitled to a liberal monetary award, no less than the amount of its expenditures in locating and making available to the government the wreck of the HATTERAS, or, alternatively, that it is entitled to a salvage award consisting of the entire vessel. *Brady* is not authority, however, for the recoupment of salvage expenses; nor is there any authority, in the absence of a contractual or quasi-contractual relationship between the salvor and the owner of property, allowing a recoupment of expenses *per se* under the law of salvage.¹⁰ A basic principle of salvage is, and always has been, that the salvor is rewarded if, and to the extent that, he has been successful in saving property. The salvor's award can never be greater than the value of the salvaged property, and in the vast majority of cases does not equal that value. G. Gilmore & C. Black, *supra*.

Both *Brady* and *Treasure Salvors* are limited authority for the proposition that a salvage award may consist of the entirety of the property which he has salvaged.¹¹ In *Treasure Salvors*, the Fifth Circuit indicated in dicta that, in the case of an abandoned and derelict vessel, the law of salvage would support an award of the entire derelict property to the person who first finds the property and reduces it to his possession through the initiation of sal-

10. While the parties may contract for payment of salvage expenses, the salvage award is not limited to expenses; nor, where the expenses of salvage exceed the value of the salvaged property, has a rule emerged allowing recoupment of expenses. In the context of "pure life salvage," recoupment of expenses has occasionally been permitted. Even here, however, no recovery is possible in the absence of a quasi-contractual relationship between the parties. *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers*, 553 F.2d 830 (2nd Cir. 1977).

11. See also *Rickard v. Pringle*, 293 F.Supp. 981 (E.D. N.Y. 1968); *Wiggins v. 1100 Tons, More or Less, of Italian Marble, supra*.

vage operations.¹² Such a result may be improper, however, when the property in question has not been abandoned by its rightful owners. In every case relied upon by the plaintiff the salvaged property had been abandoned by its former owner. These decisions merely harmonize the result obtained under the law of finds and the law of salvage, which apply with equal force to property found abandoned and derelict at sea. Whether the law of salvage will support an award of title to salvaged property that has not been abandoned by its owner is not addressed by these cases, and the Court is aware of no case similar in fact to this one in which an award of this nature has been made.¹³

12. 569 F.2d at 337 and n. 12.

13. Apparently, the Court could award the plaintiff the entire value of the salvaged property if such an award was justified on the record before the Court. In such an event, the Court could further order that the property be sold at judicial sale and that the proceeds of sale be paid to the plaintiff in satisfaction of the award. This obtains because the salvage award creates a maritime lien upon the property *in rem*. Were the Court to entertain such an award, the distinction between awarding the plaintiff the proceeds of a forced sale of the property and the property itself arguably would be of no import. See *Treasure Salvors*, 569 F.2d at 337 and n. 11; *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp. at 457.

In view of the foregoing, however, it is clear that an award consisting of the entire property salvaged would be proper, if at all, only if the Court concludes that the plaintiff is entitled to an award no less than the entire value of the property. See *Brady v. S.S. AFRICAN QUEEN*, *supra*. As discussed in Section V *infra*, the Court is presently unable to make such a determination based on the record before it.

Should the Court, on the basis of a factually adequate record, determine that the plaintiff is entitled to a salvage award equal to the total value of the salvaged property, another factor militates strongly against an award of the property itself in lieu of a monetary award. The plaintiff has asserted that the government is liable *in personam* for the award under the Public Vessels Act, 46 U.S.C. §§ 781 *et seq.* An award of salvaged property would deny the government the opportunity to quiet title to and reclaim the property by satisfying a

Even were the Court to award the plaintiff salvaged property in lieu of a monetary award, the plaintiff is not entitled to an award consisting of the entire vessel. The plaintiff forgets that it has not salvaged the entire vessel; rather it has succeeded merely in recovering several artifacts from the vessel, albeit at great expense. Nor may the plaintiff continue in its efforts to salvage the vessel without the consent of the government. It is axiomatic in the law of salvage that the owner of imperiled property having returned to possession, is entitled to refuse unwelcome offers of salvage and to exclude would-be salvors from the property. See *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611 (1927); *Bonifay v. S.S. PARAPORTI*, 145 F.Supp. 879 (E.D. Va. 1956). Because a salvor of property is rewarded only to the extent that he has been successful in saving another's property, the plaintiff's salvage award in this case cannot exceed the value of the several artifacts successfully salvaged by the plaintiff and presently in the custody of the United States Marshal.

V. CONCLUSION

Determination of the amount and extent of a salvage award, being essentially a question of fact, is within the sound discretion of a federal court sitting in admiralty. *Sobonis v. S/T NATIONAL DEFENDER*, 298 F.Supp. 631 (S.D. N.Y. 1969). The Court may properly consider a myriad of factors in fixing an award for salvage, including:

monetary judgment and extinguishing the maritime lien. Generally, the law of salvage looks unfavorably upon an award which would deny the owner of salvaged property the benefit of its preservation, and this Court is unwilling to fashion a decree effectively divesting the Government of its property without recourse unless appropriate relief for the plaintiff cannot be otherwise afforded.

- (1) The labor expended by the salvors in rendering the salvage service;
- (2) The promptitude, skill, and energy displayed in rendering the service and saving the property;
- (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
- (4) The risk incurred by the salvors in securing the property from the impending peril;
- (5) The value of the property saved;
- (6) The degree of danger from which the property was rescued.

THE BLACKWALL, 77 U.S. (10 Wall) 1, 14 (1869).

The determination of the value of the property saved establishes the uppermost amount of any salvage award, while the remaining complex of factors establish the merits of the services provided. The salvage award is a quotient of the value of the salvaged property and the order of merit demonstrated by the salvor. In the absence of probative evidence in the record as to many of the factors enumerated by the Supreme Court in the *BLACKWALL* case, however, this Court cannot fix an award for salvage without exceeding the discretion vested in it as a finder of fact. The post-trial briefs filed by the parties in this case cannot remedy the factual insufficiency of the record in this regard. The Court is therefore of the opinion that further proceedings are required to determine the amount and extent of the salvage award in this case. A prehearing conference shall be scheduled and the matter set for hearing as soon as the Court's docket permits.

Therefore, for the reasons assigned herein, it is

ORDERED, ADJUDGED and DECREED that the plaintiff have judgment against the defendant for a salvage award in an amount and extent to be determined by the Court after further proceedings, such award to be enforced by a lien upon the several artifacts salvaged from the vessel identified as the U.S.S. HATTERAS and presently in the custody of the United States Marshal. Plaintiff's claim for relief in all other respects is DENIED.

DONE at Galveston, Texas, this the 25th day of February, 1981.

/s/ HUGH GIBSON

United States District Judge

APPENDIX E

UNITED STATES CONSTITUTION

Section 3, Clause 2, Article IV.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

TREATY

THE GENEVA AWARD UNDER ARTICLES I TO XI OF THE CONVENTION OF 1871 made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the 8th of May 1871, between the United States and Great Britain.

. . .

The United States of America and Her Britannic Majesty having agreed by Article I. of the treaty concluded and signed at Washington the 8th of May 1871, to refer all the claims "generically known as the Alabama claims" to a tribunal of arbitration to be composed of five arbitrators . . .

. . .

And whereas with respect to the vessel called the Alabama, . . . the British Government failed to use due diligence in the performance of its neutral obligations . . .

. . .

The tribunal, making use of the authority conferred upon it by article VII of the said treaty, by a majority of four voices to one awards to the United States a sum of \$15,500,000 in gold as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in article VII of the aforesaid treaty.

And, in accordance with the terms of article XI of the said treaty, the tribunal declares that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled".

Further it declares, that "each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible."

. . .

UNITED STATES STATUTES

16 U.S. Code:

§ 470a. National Register; grants for comprehensive surveys; matching grants-in-aid to National Trust for Historic Preservation in the United States; definitions

(a) The Secretary of the Interior is authorized—

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant

in American history, architecture, archeology, and culture, hereinafter referred to as the National Register, . . .

. . .

(b) As used in sections 470 to 470b and 470c to 470n of this title—

(1) The term “State” includes, in addition to the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

. . .

(3) The term “historic preservation” includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

(4) The term “Secretary” means the Secretary of the Interior.

40 U.S. Code:

§ 471. Congressional declaration of policy

It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government

personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

June 30, 1949, c. 288, § 2, 63 Stat. 378; Sept. 1, 1954, c. 1211, § 1, 68 Stat. 1126.

. . . .

§ 472. Definitions

As used in title I through VI of this Act—

(f) The term “foreign excess property” means any excess property located outside the States of the Union, the District of Columbia, Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

40 U.S. Code:

§ 483(h). Abandonment, destruction or donation of property

(h) The Administrator may authorize the abandonment, destruction, or donation to public bodies of property which has no commercial value or of which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale.

June 30, 1949, c. 288, Title II, § 202, 63 Stat. 384; July 12, 1952, c. 703, § 1(f)-(h), 66 Stat. 593.

§ 512. Methods and terms of disposal—Authority of executive agency

(a) Foreign excess property not disposed of under subsections (b) and (c) of this section may be disposed of . . . The head of each executive agency responsible for the disposal of foreign excess property may execute such documents for the transfer of title or other interest in property and take such other action as he deems necessary or proper to dispose of such property; and may authorize the abandonment, destruction, or donation of foreign excess property under his control which has no commercial value or the estimated cost of care and handling of which would exceed the estimated proceeds from its sale.

. . .

REGULATIONS

36 C.F.R. § 800.2 Definitions.

As used in these regulations:

. . .

(d) "National Register" means the National Register of Historic Places. It is a register of districts, sites, buildings, structures, and objects of national, State, or local significance in American history, architecture, archeology, and culture that is expanded and maintained by the Secretary of the Interior under authority of section 2(b) of the Historic Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461) and Section 101(a)(1) of the National Historic Preservation Act implemented through 36 CFR Part 60. The National Register is published in its entirety in the

FEDERAL REGISTER each year in February. Addenda are usually published on the first Tuesday of each month.

(e) "National Register property" means a district, site, building, structure, or object included in the National Register.

(f) "Eligible property" means any district, site, building, structure, or object that meets the National Register Criteria.

(g) "National Register Criteria" means the criteria established by the Secretary of the Interior to evaluate properties to determine whether they are eligible for inclusion in the National Register. (See 36 CFR 60.6.)

. . .

APPENDIX F

DEPARTMENT OF THE NAVY
Office of the Chief of Naval Operations
Washington, D.C. 20350

(Seal)

In Reply Refer to
Ser 434/707047
12 Mar 1976

From: Chief of Naval Operations

To: Secretary of the Navy

Subj: USS HATTERAS; Recommendation for Abandonment of

1. A group of private individuals has expressed an interest in salvaging the wreck of USS HATTERAS for the purpose of using the wreck and related artifacts for historical purposes. The USS HATTERAS, a Union Navy Gunboat, was sunk in the Gulf of Mexico approximately 20 miles south of Galveston, Texas as a result of an engagement with the CSS ALABAMA on 11 January 1863.

2. It appears that the Navy has no interest in USS HATTERAS other than a historical one and is prepared to relinquish all claims to the ship. In order to legally dispose of any interest that Navy may have in USS HATTERAS, it will be necessary to abandon the wreck under authority of Section 202(h) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 385), as amended (40 USN 483(h)). To effect abandonment under said law, and in accordance with the provisions of Navy Property Redistribution and Disposal Regulation No. 1, it is necessary that the Chief of Naval Operations

certify that USS HATTERAS is not essential to the defense of the United States, and forward such certification, together with a recommendation that the vessel be declared abandoned, to the Secretary of the Navy for approval. Upon approval by the Secretary, the vessel does in fact become abandoned.

3. It is hereby certified that USS HATTERAS is not essential to the defense of the United States, and it is recommended that USS HATTERAS be declared abandoned.

/s/ JOHN D. CHASE

John D. Chase

Assistant Deputy Chief of

Naval Operations (Logistics)

Copy to:

(See page 2)

DEPARTMENT OF THE NAVY
Naval Supply Systems Command
Washington, D.C. 20376

(Seal)

In Reply Refer to
0422G/WCH
8 Mar 1976

From: Commander, Naval Supply Systems Command

To: Chief of Naval Operations (OP-434)

Subj: USS HATTERAS; abandonment of

Ref: (a) Federal Property and Administrative Services Act of 1949 (63 Stat. 385)

Encl: (1) NJAG ltr ser 1521 of 17 Feb 1976 w/encl

1. The enclosure to enclosure (1) is an expression of interest in salvaging the wreck of the USS HATTERAS, a gunboat of the Union Navy which was sunk in the Gulf of Mexico approximately 20 miles south of Galveston, Texas, as a result of an engagement with the CSS ALABAMA on 11 January 1863. The objective of the salvage is to utilize the wreck and related artifacts for historical purposes. Although the USS HATTERAS is not currently listed on the Naval Vessel Register, title is still vested in the U.S. Navy pending formal abandonment.

2. To effect abandonment, it is necessary that the Chief of Naval Operations certify that the USS HATTERAS is not essential to the defense of the United States and forward such certification, together with a recommendation that the vessel be declared abandoned, to the Secretary of the Navy for approval. Upon approval by the Secretary, the vessel does in fact become abandoned.

3. The Navy has no apparent interest in USS HATTERAS other than a historical one and it is recommended that action be initiated under Section 202(h) of reference (a), as amended (40 U.S.C., 483(h)), to abandon this vessel.

E. J. McDERMOTT
By direction

Copy to:
NJAG-11 (w/o encl)
OP-09-BH-CU (w/o encl)
NAVSEA-00C
NAVMAT-043
OP-412

35a

DEPARTMENT OF THE NAVY

Office of the Secretary
Washington, D.C. 20350

(Seal)

Ser 434/707048
25 Mar 1976

FIRST ENDORSEMENT on CNO ltr ser 434/707047
of 12 Mar 1976

From: Secretary of the Navy

To: Chief of Naval Operations

Subj: USS HATTERAS; Recommendation for Aban-
donment of

1. In view of the report and certification set forth in the basic letter, and inasmuch as the Department of the Navy has in fact long since abandoned such vessel, a formal declaration of such abandonment is hereby made.

2. Returned for appropriate action.

/s/ J. WILLIAM MIDDENDORF II
Secretary of the Navy

Copy to:

CHNAVMAT

COMNAVSEASYS COM

NAVSEADET

COMNAVSUPSYSCOM

NAVY JAG

OP-09BH

No. 82-1767

JUL 28 1983

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1983

HATTERAS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

TABLE OF AUTHORITIES

Page

Cases:

<i>Ashwander v. TVA</i> , 297 U.S. 288	3
<i>Illinois v. Gates</i> , No. 81-430 (June 8, 1983)	5
<i>INS v. Miranda</i> , No. 82-29 (Nov. 8, 1982)	5
<i>Royal Indemnity Co. v. United States</i> , 313 U.S. 289	3
<i>Schweiker v. Hansen</i> , 450 U.S. 785	5
<i>United States v. California</i> , 332 U.S. 19	3
<i>United States v. Pennsylvania & Lake Erie Dock Co.</i> , 272 Fed. 839	4
<i>United States v. San Francisco</i> , 310 U.S. 16	5

Constitution, statutes and regulation:

U.S. Const. Art. IV § 3, Cl. 2 (Property Clause)	3
Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 <i>et seq.</i> :	
40 U.S.C. 483(h)	2
40 U.S.C. 512	2
Public Vessels Act, 46 U.S.C. 781	2
Suits in Admiralty Act, 46 U.S.C. 741 <i>et seq.</i>	2
45 C.F.R. 101-45.500	2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1767

HATTERAS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that, pursuant to the common law of abandonment and found property, it is the rightful owner of the sunken Civil War naval vessel *U.S.S. Hatteras*.

1. The *U.S.S. Hatteras* was assigned to blockade duty in the Gulf of Mexico south of Galveston, Texas, when, on January 11, 1863, it encountered the notorious Confederate raider *C.S.S. Alabama*. The *Hatteras* was severely damaged in the ensuing engagement and sank. The United States Navy made no attempt thereafter to raise or salvage the vessel or even to pinpoint the location of the wreck.

Since 1972 petitioner has been engaged, intermittently, in efforts to locate the *U.S.S. Hatteras* and to raise her remains. In February 1976 petitioner informed the Navy that it had located a sunken vessel that it believed to be the

Hatteras and that it wished to salvage the vessel. On the basis of the Chief of Naval Operations' certification that the *Hatteras* "is not essential to the defense of the United States" (Pet. App. 32a), the Secretary of the Navy stated in a March 25, 1976, memorandum: "[I]nasmuch as the Department of the Navy has in fact long since abandoned such vessel, a formal declaration of abandonment is hereby made" (*id.* at 35a).¹ Neither the Secretary nor any of his subordinates made a written finding in this connection that the sunken vessel was devoid of commercial value or that retention of the vessel was uneconomic. Yet regulations (41 C.F.R. 101-45.500) that implement provisions of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 483(h) and 512, require that such a written finding be made by the head of a federal agency as a prerequisite to abandonment of federal property under the agency's control.

2. Thereafter, on January 28, 1977, the Secretary of the Interior nominated the wreck of the *U.S.S. Hatteras* for inclusion in the National Register of Historic Places. Petitioner responded by filing this action pursuant to the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, and the Public Vessels Act, 46 U.S.C. 781, seeking confirmation of its claim to ownership of the *Hatteras*, or, in the alternative, a salvage award. The United States District Court for the Southern District of Texas held that the United States had not effected a valid legal abandonment of the *Hatteras* (Pet. App. 12a-18a) and that petitioner's salvage claim was time-barred (*id.* at 3a-6a). The court of appeals affirmed without opinion (*id.* at 1a).

¹ The memorandum from the Chief of Naval Operations to the Secretary stated that "title [to the *U.S.S. Hatteras*] is still vested in the U.S. Navy pending formal abandonment" (Pet. App. 33a).

3. a. The decision of the courts below presents no issue warranting further review. Petitioner claims (Pet. 4-6) that it was free to appropriate the sunken vessel *U.S.S. Hatteras* under the common law of abandonment and found property. But the Constitution vests exclusive authority to dispose of property of the United States in Congress or its delegate. Article IV, Section 3, Clause 2 provides in pertinent part:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Federal officials have no power to dispose of federal property absent an express or implied delegation of authority under the Property Clause. *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941).² Moreover, as this Court has emphasized:

[T]he Government, which holds its interests * * * in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 40 (1947). Accordingly, the United States' title to the *U.S.S. Hatteras*

²*Ashwander v. TVA*, 297 U.S. 288, 338 (1936), cited for a contrary proposition by petitioner (Pet. 7), holds only that the Constitution does not limit the methods that Congress or its delegate may prescribe for disposition of federal property.

could not be lost through operation of the judge-made doctrine of abandonment.³

b. Petitioner relies (Pet. 5) upon the Secretary of the Navy's declaration of abandonment. Yet petitioner does not quarrel with the conclusion of the courts below that the Secretary's action was ineffective to accomplish abandonment of the *U.S.S. Hatteras* under the governing statute and regulations. See page 2, *supra*. Petitioner has not cited any other statutory predicate for abandonment by the Secretary and we are aware of none.⁴ The Secretary's apparent misapprehension of the proper procedures for

³None of the ship abandonment cases cited by petitioner (Pet. 4-6, 8) involved an assertion of title adverse to the United States. Petitioner's reliance upon *United States v. Pennsylvania & Lake Erie Dock Co.*, 272 F. 839 (6th Cir. 1921), is also misplaced. There the court recognized the general rule that "the government cannot abandon its property without an Act of Congress to that effect" (*id.* at 843), but deemed that rule inapplicable to abandonment of a dock constructed pursuant to the navigation servitude. The court characterized the government's interest at issue as "a mere easement for purposes more or less temporary in their nature" (*ibid.*). This rationale, even if valid, has no application to the present case.

⁴Petitioner seeks (Pet. 5) support for a finding of abandonment in the arbitration award made to the United States by an international tribunal pursuant to a treaty entered into by the United States and Great Britain after the Civil War providing for resolution of "The *Alabama* Claims." Those claims arose from Great Britain's assistance to Confederate blockade runners. Although the sinking of the *Hatteras* apparently was within the scope of the United States' claim against Great Britain, the arbitrators made a lump sum award without assigning any particular sum as indemnification for the loss of a particular vessel. In any event, assuming it could be shown that Great Britain paid indemnity to the United States for the sinking of the *Hatteras*, it would not follow that the United States abandoned its title to the remains of the vessel by accepting these damages. The memorandum from the Chief of Naval Operations (see page 2 note 1, *supra*) indicates the contrary.

abandonment cannot overcome the impediment to petitioner's claim. *United States v. San Francisco*, 310 U.S. 16, 32 (1940).⁵

c. Petitioner's final contention (Pet. 6-7), is that the Secretary of the Interior lacked authority to designate a sunken ship outside United States territorial waters for inclusion in the National Register of Historic Places. This question is not properly presented because petitioner did not raise it below and it was not addressed by the lower courts. See *Illinois v. Gates*, No. 81-430 (June 8, 1983), slip op. 2-8. Nor does this issue have any bearing on the underlying title dispute, because the United States has never contended that its title to the *U.S.S. Hatteras* depends upon the historic register designation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1983

⁵Petitioner does not now argue that the United States is equitably estopped to oppose his claim. He did make that argument in the district court, but the district court rejected it, finding no reliance upon the Secretary's action (Pet. App. 18a). Nor is there any showing of affirmative misconduct in this case. See, e.g., *INS v. Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981).